HTH Corporation d/b/a Pacific Beach Hotel, *and* International Longshore &Warehouse Union, Local 142, AFL–CIO, Petitioner. Case 37–RC–4022

June 30, 2004

DECISION AND DIRECTION

BY CHAIRMAN BATTISTA AND MEMBERS LIEBMAN AND WALSH

The National Labor Relations Board, by a three-member panel, has considered objections to and determinative challenges in an election held July 31, 2002, and the administrative law judge's report recommending disposition of them. The election was conducted pursuant to a Decision and Direction of Election. The tally of ballots shows 209 for and 204 against the Petitioner, with 36 challenged ballots.

The Board has reviewed the record in light of the exceptions[1] and briefs, and has adopted the judge's findings and recommendations as discussed below.[2]

Introduction

The judge recommended sustaining the challenges to the ballots of Jane Fee, Emyl Schlenker, and Lisa Hayashi, and overruling the challenges to the ballots of Patricia Bell and Brenda Dolente. The judge further found that the Employer engaged in certain objectionable conduct, and accordingly sustained Objections 1, 2, 8, and 9. For the reasons set forth by the judge, we adopt his recommendations with respect to the challenges to the ballots of Schlenker, Bell, and Dolente. For the following reasons, we adopt the judge's recommendation as to Hayashi, but find it unnecessary to pass on the challenge to Fee. Finally, we adopt the judge's recommendation to sustain Objections 1 and 8. Because we find Objections 1 and 8 sufficient to warrant setting aside the election, we find it unnecessary to pass on the judge's recommendation that Objections 2 and 9 also be sustained.[3]

Challenged Ballots

1. The judge found that Jane Fee was a supervisor under Section 2(11) of the Act, and accordingly recommended sustaining the challenge to her ballot. The Employer has excepted to this finding. We find it unnecessary to pass at this time on the challenge to Fee's ballot. In light of the numerous challenged ballots in this case, there is a possibility that Fee's ballot may not be determinative. We will therefore hold it in abeyance pending the revised tally of ballots.

2. In recommending that the challenge to the ballot of Lisa Hayashi should be sustained, the judge found that Hayashi should not be included in the unit because she was a casual employee and because of her familial relationship to the Employer. In adopting the judge's recommendation to sustain the challenge to Hayashi's ballot, we rely on the judge's finding that Hayashi was a casual employee. We do not pass on the additional finding that Hayashi's familial relationship warrants her exclusion from the unit.

Objection 1

The judge recommended sustaining Objection 1, which alleges that "the Employer . . . threatened, coerced and interfered with the rights of employees . . . by threatening loss of reduction of wages, hours of work, and other conditions of employment, if they voted for the Union or if the Union won representation rights." In recommending that the objection be sustained, the judge found that the Employer interrogated employees about their support for the Union. In its exceptions, the Employer argues that Objection 1 should be overruled because it does not encompass interrogations. For the following reasons, we find no merit to the Employer's contention.

The credited testimony establishes that Sandra Tokunaga, the Employer's group reservations manager, asked four reservation clerks whether they were "yes" or "no" regarding support for the Union. Tokunaga testified that she asked three of them at one time, sometime in May or June,[4] and they did not give her a response. About 3 days before the election, Tokunaga called another employee, Judith Agliam-Howard, while both she and Howard were at work, and asked her the same question. Howard told

[1] The Employer has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

The Employer also contends that the judge's rulings, findings, and conclusions demonstrate bias and prejudice. On careful examination of the judge's decision and the entire record, we are satisfied that the Respondent's contentions are without merit.

[2] The parties stipulated at the outset of the hearing that 13 challenged ballots should not be counted, and at the conclusion of the hearing the Union withdrew challenges to 3 ballots. Additionally, the judge recommended sustaining the challenge to 1 ballot, and recommended overruling the challenges to 14 other ballots. In the absence of exceptions, we adopt, pro forma, these recommendations. In the absence of exceptions, we also adopt the judge's recommendation that Objections 4, 6, 7, 10, 11, 12, 13, 14, and portions of Objections 1 and 2 be overruled. The Union withdrew Objections 3 and 5 at the hearing.

[3] For that reason we find it unnecessary to comment on our dissenting colleague's discussion of Objections 2 and 9.

[4] All dates are in 2002 unless otherwise indicated.

Tokunaga that she was undecided. Tokunaga testified that she was subsequently told that she should not have questioned employees as she did.

At the close of the hearing, the Union withdrew Objection 3, which alleged that the Employer coercively interrogated employees.[5] However, in its posthearing brief, the Union addressed Tokunaga's conduct as encompassed within Objection 1. The Employer's posthearing brief also addressed Tokunaga's conduct, and specifically urged that it not be found objectionable. Although the Employer did not specifically refer to Tokunaga's conduct in connection with Objection 1, the Employer did not argue in its brief that Tokunaga's conduct was no longer at issue due to the withdrawal of Objection 3. The judge recommended sustaining Objection 1 on the basis of Tokunaga's conduct.

In its exceptions, the Employer raises, for the first time, the argument that Tokunaga's conduct was not properly before the judge because of the withdrawal of Objection 3. The Employer contends that Objection 1 on its face does not encompass interrogations and that Objection 3, which expressly does so, was expressly withdrawn by the Union at the close of the hearing. On this basis the Employer argues that the judge inappropriately reached an issue that was not properly before him. In support, the Employer cites *Precision Products Group*, 319 NLRB 640, 641 (1995), where the Board reversed a hearing officer's finding of objectionable conduct because the objecting party had withdrawn the relevant objection prior to the hearing and the issue was "not reasonably encompassed within the scope of the objections." In the circumstances of this case, we find no merit to the Employer's contention.

There is no dispute that Tokunaga's conduct was fully litigated at the hearing. Indeed, both parties examined Tokunaga and Judith Agliam-Howard, one of the employees she interrogated. Further, after the close of the hearing, both parties addressed Tokunaga's conduct in their posthearing briefs, and argued whether that conduct was objectionable. In its brief, the Union specifically requested that the judge sustain Objection 1 on the basis of Tokunaga's conduct. The Employer, though not referring to Objection 1 by name, specifically urged the judge to find that Tokunaga's conduct was not objectionable.[6] Significantly, neither party suggested to the judge that Tokunaga's comments were no longer at issue. Thus, despite the Union's withdrawal of Objection 3, the parties and the judge all understood, and by their conduct demonstrated, that Tokunaga's conduct was a live issue at all times. Accordingly, we find that the judge properly recommended sustaining Objection 1 on the basis of Tokunaga's conduct.

Precision Products, cited by the Employer, is distinguishable. First, although the Board in that case found that the conduct encompassed within a withdrawn election objection could not be used to set aside an election, there was nothing in that case showing, as here, an understanding by the parties that the conduct in question was still a live issue, despite the withdrawal of an objection. In addition, the hearing officer in *Precision*, in response to an evidentiary objection raised over the introduction of evidence relevant to the withdrawn election objection, assured the employer at the hearing that the evidence would only be considered as it relates to a live objection. Nevertheless, the hearing officer used that evidence to reach the issues raised in the withdrawn objection. *Precision Products*, above at 641. Conversely, in this case, there is no contention that the judge misled the Employer into believing that Tokunaga's interrogations were not a live issue; indeed, the Employer's brief reflects its clear understanding that Tokunaga's conduct was still at issue, despite the withdrawal of Objection 3. For these reasons, *Precision Products* is inapposite.

In arguing that Objection 1 should be overruled, our dissenting colleague contends that Tokunaga's conduct is beyond the scope of the objection because Objection 1 does not explicitly cover "interrogations." We disagree. First, Objection 1 alleges that the Employer "coerced" and "interfered" with the rights of employees. This description aptly fits Tokunaga's coercive interrogations of employees. Furthermore, the record establishes that the parties understood that Tokunaga's conduct was still at issue despite the withdrawal of Objection 3, and filed their briefs accordingly. For these reasons, a refusal to consider Tokunaga's interrogations would be contrary to the parties' clear intent. Accordingly, we adopt the judge's recommendation to sustain Objection 1.

Objection 8

The judge recommended sustaining Objection 8, finding that the Employer maintained an overly broad no-

[5] Objection 3 states as follows: "UNLAWFUL INTERROGATION - -Commencing on April 26, 2002 and thereafter, the Employer, acting by and through its representative, employees, and agents, questioned employees regarding their Union sentiment, about their intention to vote for or against the Union, and about Union meetings, inquired about attendance of various employees at union meetings. Said conduct (and other related practices of the Employer) violated Section 7 rights of employees under the Act."

[6] For example, the Employer's brief states that "the Union failed to prove that any incident between Sandi Tokunaga and Judith Agliam-Howard rose to the level of coercion that would be sufficient to overturn the results of the election." Emp. Posthearing Br. at 117.

solicitation policy. We agree. The Employer's policy, appearing in the handbook it gave to all employees upon their hire, states that employees may not "solicit or promote support for any cause or organization AT ANY TIME WHILE ON COMPANY PROPERTY" (emphasis in original). In addition, the policy states that "[n]o employee shall distribute or circulate any written or printed literature at any time while on Company property," and that these rules apply to any solicitation or distribution of literature, "including . . . labor unions."

In recommending that the objection be sustained, the judge found that the Employer's maintenance of the policy was overbroad because it prevented solicitation or distribution of union literature at any time on the Employer's property. The judge also found that the Employer had never rescinded the unlawful rule, and that the maintenance of the unlawful rule warranted setting aside the election. In support, the judge cited *Freund Baking Co.*, 336 NLRB 847 (2001), where the Board directed a second election because of the maintenance of an employee handbook rule forbidding discussion of wages, hours, and other terms and conditions of employment. Even though there was no evidence in *Freund* that the rule was ever enforced, the Board found that the mere maintenance of the overbroad rule "reasonably tended to interfere with employees' free choice." Id.

In its exceptions, the Employer argues that any effect the rule had on the election was de minimis because the policy was never enforced, and thus it is impossible to conclude that the rule could have affected the election. We find the Employer's argument without merit.

To begin, the no-solicitation policy is clearly overbroad, and our dissenting colleague does not argue to the contrary. The policy prevents employees from discussing the election in non-work areas, or during non-work time, or from distributing literature in non-work areas. *Superior Emerald Park Landfill*, 340 NLRB No. 54, slip op. at 9 (2003) (rule preventing solicitation during work breaks overbroad). The rule applied to the entire bargaining unit, appeared in the Respondent's employee handbook, and was disseminated to all unit employees. Indeed, the policy emphasizes its over-breadth with capital letters, prohibiting solicitation "AT ANY TIME WHILE ON COMPANY PROPERTY." Additionally, the policy was specifically applicable to "any solicitation or distribution of literature, including . . . labor unions." Further, there is no evidence that the employees were ever told that they could ignore the policy.[7] These facts clearly demonstrate that an employee "*could* reasonably have construed" the policy as not tolerating any discussion of the union on "company property." *Freund*, above at fn. 5. In these circumstances, the Employer's maintenance of this overbroad rule during the critical period could reasonably tend to interfere with the employees' free choice.

The Employer contends, and our dissenting colleague agrees, that the lack of evidence of enforcement of the rule requires overruling the objection. We vigorously disagree. As explained in *Freund*, the mere maintenance of an overbroad rule can affect the election results because employees could reasonably construe the provision as a directive from their employer that they refrain from engaging in permissible Section 7 activity. *Freund*, supra at fn. 5. In other words, the lack of evidence of enforcement does not establish that employees could not reasonably believe that they might be subject to disciplinary consequences if they violated the policy. This is especially so in this case, where the policy explicitly stated that the rules apply to solicitation and distribution of material concerning "labor unions." For this reason, it is reasonable to conclude that the maintenance of the rule *could* have affected the election results.[8] Accordingly, we adopt the judge's recommendation to sustain this objection.

In sum, we find that the Employer engaged in objectionable conduct by coercively interrogating employees and maintaining an overly broad no-solicitation policy. This conduct warrants setting aside the election if the revised tally of ballots does not show a majority of votes for the Union.

DIRECTION

IT IS DIRECTED that the Regional Director for Region 37 shall, within 14 days from the date of this Decision and Direction, open and count the ballots of David Tanimoto, Melanie Rubin, Reden Bartolome, Alma Hamamoto, Rendi Kanaiaupuni, Daniel Kadowaki, Chester Huan, Marlene Morimoto, Scott Kazunga, Donna Hashiro, Elizabeth Fuji, Leslie Shim, Wendy Mukai, Patricia Bell, Brenda Dolente, Shaun Nawatani, Shota Fujinaga, Hidemi Oba, and Peter To. In the event that the revised tally of ballots shows that a majority of the valid ballots have been cast for the International Longshore & Warehouse Union, Local 142, AFL-CIO, and that the challenged ballot of Jane Fee would not be de-

[7] To that end, the Employer's reliance on *Bell Halter, Inc.*, 276 NLRB 1208, 1223 (1985), is misplaced. There, the employer actually told all unit employees that they could distribute literature in nonwork areas on non-worktime in spite of its policy. In this case, the Employer made no such announcement.

[8] See also *IRIS U.S.A.*, 336 NLRB 1013 (2001) (finding objectionable overly-broad rule without evidence of enforcement); and *FGI Fibers, Inc.*, 280 NLRB 473, 474 (1986) (finding overly-broad rule objectionable despite "absence of evidence that the rule was actually enforced").

terminative, the Regional Director shall then serve on the parties a revised tally of ballots and issue the appropriate certification.

IT IS FURTHER DIRECTED that, in the event that the challenged ballot of Jane Fee should be determinative on the issue of whether the Petitioner is the exclusive collective-bargaining representative of the unit employees, any certification shall be held in abeyance pending the resolution of the challenge to the ballot of Jane Fee.

Finally, in the event that the revised tally of ballots (following disposition of the challenge to Fee's ballot, if determinative) reflects that a majority of the valid ballots have not been cast for the International Longshore & Warehouse Union, Local 142, AFL–CIO, IT IS DIRECTED that the July 31, 2002 election be set aside and that the Regional Director shall conduct a second election in conformance with the following direction.

DIRECTION OF SECOND ELECTION

A second election by secret ballot shall be held among the employees in the unit found appropriate, whenever the Regional Director deems appropriate. The Regional Director shall direct and supervise the election, subject to the Board's Rules and Regulations. Eligible to vote are those employed during the payroll period ending immediately before the date of the Notice of Second Election, including employees who did not work during the period because they were ill, on vacation, or temporarily laid off. Also eligible are employees engaged in an economic strike that began less than 12 months before the date of the first election and who retained their employee status during the eligibility period and their replacements. *Jeld-Wen of Everett, Inc.*, 285 NLRB 118 (1987). Those in the military services may vote if they appear in person at the polls. Ineligible to vote are employees who have quit or been discharged for cause since the payroll period, striking employees who have been discharged for cause since the strike began and who have not been rehired or reinstated before the election date, and employees engaged in an economic strike that began more than 12 months before the date of the first election and who have been permanently replaced. Those eligible shall vote whether they desire to be represented for collective bargaining by the International Longshore & Warehouse Union, Local 142, AFL–CIO.

To ensure that all eligible voters have the opportunity to be informed of the issues in the exercise of their statutory right to vote, all parties to the election should have access to a list of voters and their addresses that may be used to communicate with them. *Excelsior Underwear*, 156 NLRB 1236 (1966); *NLRB v. Wyman-Gordon Co.*, 394 U.S. 759 (1969). Accordingly, it is directed that an eligibility list containing the full names and addresses of all the eligible voters must be filed by the Employer with the Regional Director within 7 days from the date of the Notice of Second Election. *North Macon Health Care Facility*, 315 NLRB 359 (1994). The Regional Director shall make the list available to all parties to the election. No extension of time to file the list shall be granted by the Regional Director except in extraordinary circumstances. Failure to comply with this requirement shall be grounds for setting aside the election if proper objections are filed.

Dated, Washington, D.C. June 30, 2004

Wilma B. Liebman, Member

Dennis P. Walsh, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

CHAIRMAN BATTISTA, dissenting in part.

Contrary to my colleagues, I would reverse the judge's recommendations to sustain Objections 1, 2, 8, and 9. Accordingly, I would direct the Regional Director to issue a revised tally of ballots and issue the appropriate certification.[1]

1. My colleagues adopt the judge's recommendation to sustain Objection 1, which alleges that "the Employer . . . threatened, coerced and interfered with the rights of employees . . . by threatening loss of reduction of wages, hours of work, and other conditions of employment, if they voted for the Union or if the Union won representation rights." My colleagues sustain this objection on the basis that supervisor Sandra Tokunaga interrogated four employees about their support for the Union. Contrary to my colleagues, I find that the conduct at issue is beyond the scope of this objection, and accordingly the objection should be overruled.

The facts at issue show that Supervisor Tokunaga questioned four employees whether they were "yes" or

[1] I join my colleagues in adopting the judge's recommendation to sustain the challenge to the ballot of Lisa Hayashi on the basis that she is a casual employee, to sustain the challenge to the ballot of Emyl Schlenker, and to overrule the challenge to the ballots of employees Patricia Bell and Brenda Dolente. With respect to Bell and Dolente, I note that the Employer does not argue that these employees are jointly employed by the Employer and Pagoda Hotel. I also join my colleagues in adopting pro forma the judge's recommendations concerning the disposition of other challenged ballots.

I would adopt the judge's recommendation to sustain the challenge to the ballot of Jane Fee for the reasons set forth in the judge's decision, including the finding that Fee is a supervisor within the meaning of Sec. 2(11) of the Act.

"no" regarding their support for the Union. The conduct involved nothing more. Significantly, the conduct involved no threats of any kind.

As noted, Objection 1 alleged threats and Objection 3 alleged interrogation. At the close of the hearing, the Union withdrew Objection 3. The withdrawal was accepted by the judge. The Employer reasonably concluded that interrogation was no longer at issue. Despite the fact that there no longer was an objection alleging an interrogation of any kind, the judge nonetheless found that Tokunaga's interrogation was objectionable under Objection 1.

Objection 1 clearly does not encompass interrogation. Rather, it alleges that the Employer "threaten[ed] loss of reduction of wages, hours of work, and other conditions of employment." Tokunaga's conduct did not involve a threat, and she made no mention of wages, hours of work, or other conditions of employment. Thus, while Tokunaga's conduct was within the scope of withdrawn Objection 3, it is clearly not within the scope of Objection 1, and cannot be a basis for sustaining that objection.

My colleagues note that the Employer did not argue in its brief to the judge that the interrogation matter was no longer before the judge. However, there was no need to do so. The Employer reasonably thought that the judge would not consider the interrogation matter, inasmuch as Objection 3 had been withdrawn.

My colleagues also note that the Employer briefed to the judge the testimony concerning the interrogation. However, it is not unusual for a diligent attorney to address himself to all possible adverse testimony in the record. I would not conclude that, by doing so, counsel waived the right to contest that which he could not have foreseen, viz., that the judge would consider the substance of the withdrawn Objection 3.

My colleagues rely on the fact that Tokunaga's questioning could be described as "coercive" and "interfering," and that these two words are included in Objection 1. However, such a description in that objection clearly had reference to alleged threats. To repeat, Objection 3 alleged the interrogation. To adopt my colleagues' view would render meaningless the requirement that each objection "shall contain a short statement of the reasons therefor". See 102.69(a) of the Board's Rules. In short, Objection 3 specifically related to interrogation, and it was withdrawn. It cannot be resurrected by seeking to shoe-horn it into Objection 1.

2. The judge recommended sustaining Objection 2. I disagree. Revamonte, the Union's observer during the afternoon voting session, saw several large security guards standing in a line in a hallway outside the voting area. She passed them on her way to the restroom, and one of them said, "kick their ass." The guard then laughed, as did another, and some others smiled and looked at her. The judge found that the remark could reasonably be construed as a threat and, for this reason, recommended sustaining the objection. As noted, I disagree.

First, it is not clear from the record that the guard actually directed this statement at Revamonte. Further, there is no showing that Revamonte was identifiable to the guards either as the Union's observer, or as being connected in any way with the Union or the election. Additionally, the conduct occurred prior to any voting, and there is no evidence of dissemination. Moreover, even assuming Revamonte was known by the guards to be a Union observer, it is not clear that the statement would reasonably be construed as a threat. In fact, the statement could just as reasonably be construed as voicing the desire that one party defeat the other in the election. Even if the desire was that the Employer prevail, this would not establish that the guard's conduct was objectionable.

3. Contrary to my colleagues, I also would overrule Objection 8, which alleges that the Employer engaged in objectionable conduct by maintaining an overly broad no-solicitation policy. I find that the Employer's mere maintenance of this policy is insufficient to warrant setting aside the election.

The record shows that the Employer has not enforced its policy. For example, it is undisputed that employees openly discussed the campaign at work. Some employees brought in flyers that the Union had mailed to them at home. Some supervisors knew there was Union talk going on at work, but did not enforce the policy. In addition, employees freely engaged in other kinds of solicitation at work. For instance, both employees and supervisors bought items such as candy, chicken, or tickets for charitable events from each other. In fact, the record shows that many employees had no idea that the policy even existed, as it was buried in the back of the Employer's handbook. Importantly, there is no evidence the Employer ever disciplined an employee for violating the no-solicitation policy. Thus, the record establishes that the Employer chose not to enforce its policy in the face of open solicitation and distribution.

I recognize that the Board has held that the mere maintenance of an overbroad non-solicitation or distribution rule can violate Section 8(a)(1) of the Act, and that such a finding has been found sufficient to set aside an election. See, e.g., *Freund Baking Co.*, 336 NLRB 847 (2001); *Farah Mfg. Co.*, 187 NLRB 601, 602 (1970). In this case, there is no such unfair labor practice allegation. Moreover, I find that even had an unfair labor practice charge been filed, this conduct would not have warranted

setting aside the instant election, because it is "virtually impossible to conclude that the misconduct could have affected the election results." *Clark Equipment Co.*, 278 NLRB 498, 505 (1986). Thus, the record evidence shows that the Employer did not enforce its policy, that employees freely engaged in conduct directly in conflict with the policy, and that many employees were unaware of the policy. This evidence affirmatively demonstrates that it is "virtually impossible" to conclude that the mere existence of the policy could have affected results of the election.

The majority's reliance on *Freund Baking Co.*, supra, is misplaced. In that case, there was no affirmative evidence that the written policy was a nullity, i.e., that the employees freely engaged in conduct contrary to the rule.

For all these reasons, I would overrule the objection.

4. Lastly, the judge recommended sustaining Objection 9, which alleges that the Employer engaged in objectionable conduct by granting gifts and inducements to employees two days before the election. I would reverse the judge's recommendation and overrule the objection.

The Employer provides a daily free lunch to all unit employees. Sometime in July, the Employer invited unit and non-unit employees to attend a special luncheon to mark the closing of the Ohana General Store. That store had provided food and other items to employees who lost hours because of the business slowdown that occurred after September 11, 2001. At the luncheon, held 2 days before the election, a video presentation (that did not concern the campaign) was shown on a large monitor. At times, "Vote No" would periodically flash on the monitor for a few seconds.

Also at the luncheon, the Employer handed out, at no cost, food and household items of a nominal value ($5-10) that had been left over from the closing of the store. This was not the first time that employees had received gifts from the Employer. Previously, during National Housekeepers Week, the housekeeping employees in the unit received free gifts and a luncheon, and those same employees have received more expensive items as gifts at their annual Christmas party.

The judge found merit to the objection. In doing so, he applied *B&D Plastics*, 302 NLRB 245 (1991), and noted the factors the Board traditionally analyzes in determining if a pre-election benefit constitutes objectionable conduct: (1) the size of the benefit in relation to the stated purpose for granting it; (2) the number of employees receiving it; (3) how employees would reasonably view it; and (4) the timing. I disagree with the judge.

Applying the *B&D Plastics* factors, I find the lunch not objectionable. The first factor, the size of the benefit, is very small. The distributed items were of nominal value, and the employees received a lunch from the Employer everyday. There is no indication that the food at this luncheon was any different in value from the food the employees received any other day. As to the second factor, the number of employees receiving it was no bigger than the number of employees who receive lunch on any other day. The third factor, how employees would reasonably view the lunch and free items, is arguable. Admittedly, "Vote No" did appear on the monitor periodically during lunch, but it is one element amid a number of circumstances. The nominal value of the items, the daily occurrence of a free lunch, and the non-partisan nature of the invitation to attend the event minimize any potential for undue influence. The fourth factor, the timing, is also problematic. Although the conduct occurred 2 days before the election, it also occurred shortly after the closing of the store. This problematic factor and the one discussed immediately above do not outweigh the other two factors and thus do not support sustaining the objection. See *Chicagoland Television News*, 328 NLRB 367 (1999) (finding unobjectionable a 12-hour party, the day before the election, that included food, drink, and entertainment, at a cost of $26/person). Accordingly, I would overrule the objection.

In summary, I agree with the judge's recommendations regarding the disposition of the challenged ballots, but, contrary to my colleagues, I do not find that the Employer engaged in objectionable conduct. Accordingly, I would direct the Regional Director to issue a revised tally and issue the appropriate certification.

Dated, Washington, D.C. June 30, 2004

Robert J. Battista, Chairman

NATIONAL LABOR RELATIONS BOARD